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THE CONTINUITY OF THE COMMON LAW.

IN the last chapter of Blackstone's Commentaries, which treats "of the rise, progress, and gradual improvement of the laws of England," we find the opinion that the groundwork of our law — "that admirable system of maxims and unwritten customs, which is now known by the name of the *common law*, as extending its authority universally over all the realm" — "is doubtless of Saxon parentage."[1] Blackstone's reasons for this position may not all be equally acceptable at this day. Some of the institutions in which he finds proofs of Saxon antiquity may be both less ancient and less English than he supposed. Others, though they have no traceable history before we meet them on English ground, may have originally been part of a common stock of Germanic or even Indo-European custom, and may have acquired their peculiar character only during the great work of reconstruction which the genius of Edward I. brought to fulfilment more than two centuries after the Norman Conquest. On the whole, however, Blackstone's *dictum* has been confirmed rather than shaken by the course of modern research. If in some points it is less true to the letter than Blackstone imagined, it is more true to the spirit of our law than he had the means of knowing. Nobody now believes that King Alfred had anything to do with the establishment of trial by jury, but, as we shall presently see, our accustomed form of

[1] Bl. Com. iv. 412.

trial embodies Germanic principles that are much older. The maxims which Blackstone rated so highly will hardly be considered to form a system by any lawyer of this generation, and it is to be feared that more than one or two of them would turn out, if we traced them back to their earliest ascertainable parentage, to be fragments of Roman learning distorted in various degrees by passing through the hands of canonists. But even the distortion and misunderstanding of our borrowed material bears witness to the independence of our system. Whether we have borrowed that material wisely or not, we have assimilated it and not suffered it to dominate us. In some cases where the borrowing was large, there has been a struggle; but the struggle has always ended in the foreign elements being naturalized.

When we speak of law we mean, for all practical purposes, those rules of conduct which the State deems binding on its citizens, not merely as rational and moral beings but as members of that State, and accordingly thinks fit to enforce by public authority: in other words, the rules which are administered and applied by courts of justice. It is easy for the citizen and the publicist, though impossible for the practising lawyer, to forget that these rules include the forms and methods of doing justice as well as the determination of duties and rights in themselves, and that questions of form often carry with them no small part of the substance, or even the whole. It is still easier to forget that in early stages of society the pressing need is not to define rights, but to know where to have an available remedy which will lead, or may be fairly expected to lead, to some kind of effective judgment. Redress for manifest wrong appears to us a matter of course, and we work out legal problems in full assurance that the solution, when finally arrived at, will be acted upon without difficulty. There were times when the problem was whether and by what means right could be done at all. Our modern maxim "No right without a remedy" assumes the benevolent and irresistible power of the modern lawgiver. Under early forms of law "no remedy no right," would be nearer the truth: a man who could not fit his case exactly to an appropriate remedy among a strictly limited number of formulas had practically no right.

The expansion of remedial justice, the perfection of executive method, are no less important in the history of law than the development of positive rules. What is more, the form in which positive rules are declared, the directions in which definition is attempted

or left alone, and the extent to which it is carried in particular branches of the law, depend largely on the procedure by which the rules are to be applied. Thus the existence of the body of rules which we call the law of evidence, and which have no counterpart in any other system, is a direct consequence of the manner in which we regard questions of fact as sharply distinguished from questions of law. That distinction, in turn, is intimately bound up with the history of trial by jury and the transformation of the jurymen from certifiers of facts within their own knowledge to judges of facts who know only what is brought before them, and are bound to take notice only of what is properly alleged and supported by the proper kind of testimony. Those rules of foreign systems which answer most nearly to our rules of evidence are in truth of a different nature. Their purpose is or has been not so much to fix the limits of admissible testimony as to establish a kind of mechanical self-acting scale of value for different kinds of proof and presumption. To trace the consequences of this endeavor would be to enter on the history of inquisitorial procedure, ecclesiastical and secular, on the Continent of Europe. English-speaking students at any rate would probably not find the results of the comparison unfavorable to the common law.[1]

The details of our procedure have undergone many changes.

It is true that the general outlines of a criminal trial might still be recognized by a medieval sergeant at law if he could revisit our assize courts. But our civil procedure has in England been twice reconstructed within living memory, and the learned brother whom we suppose revived to the sight of our modern practice would no doubt begin by thinking that he had everything to learn over again. This would be equally the case, or almost equally, whether he were called up from the generation of Hengham, or of Brian or of Mansfield. And yet, if he allowed himself to suppose that a revolution had taken place in the general model of our judicial business — that the methods of the canon lawyers, for example, had finally prevailed over those of the medieval common law — he would be wrong. The fundamental ideas are still there, and we commonly fail to recognize their importance just because they are so familiar to us.

An Englishman, whether lawyer or layman, is apt to take them

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[1] Cp. A. Lawrence Lowell, "The Judicial Use of Torture," HARVARD LAW REVIEW, xi. 220, 290.

for natural and necessary conditions of justice being done at all rather than characteristic features of a natural system. It is certain, however, that they are national, not universal. In fact they are unknown, or have found only very partial acceptance, in the practice of most civilized tribunals outside the English-speaking world.

Stated as briefly as possible, the conditions which we assume as a matter of course rather than explicitly postulate are of this kind.

1. Justice is before all things public. Whatever is not public in judicial proceedings is exceptional, and the exception must rest on some distinct and special ground.

2. Proceedings in all contentious matters are conducted by the parties in their own way, according to the advice of the solicitors and counsel chosen by themselves, or, if they please, in person, and at their own risk as to validity and regularity. Interference by the court, except to pronounce on a dispute whether a pleading or other step is in order, is exceptional and must be in some way specially authorized. As one of our best modern judges has said, "The court is not to dictate to parties how they should frame their case."[1] And this is the ruling principle even in criminal proceedings and other cases where as we say, the Crown is a party. That very phrase bears witness to the power of the idea.

3. The King's judges are the sole authorized interpreters of the law. No other person or body, least of all any executive officer from the King himself downwards, has any such authority. Considered judicial interpretation of the law becomes part of the law itself, and is of equal force with any other part, though liable to be superseded by fresh legislation.

But in other highly civilized countries we find systems where none or hardly any of these features can be traced: "systems which dispense almost entirely with oral evidence," or even oral proceedings of any kind, "and under which the judge intervenes at every stage, and the witnesses, if any, are the witnesses rather of the court than of the parties."[2] Publicity may be found under such systems, but exists only on sufferance, is often absent from the really vital parts of the proceedings, and is easily dispensed with for reasons of State even in matters involving what we call the liberty of the subject. The authority of judicial decisions again,

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[1] Bowen, L. J., in Knowles *v.* Roberts (1888), 38 Ch. D. 263, 270.

[2] J. Macdonell in Journ. Soc. of Comparative Legislation, i. 247, 248.

is differently understood not only in some systems, but under all which derive their origin and maxims from the Roman law, except where Anglo-Saxon forensic principles have become dominant through conquest or political assimilation as in several of our colonies and in the one case of Louisiana in the United States. In France and other countries where modern French legislation has been followed this divergent view is expressly laid down. The judge is bound to interpret and apply the law in each case as it occurs, and is positively forbidden to lay down any rule or interpretation as binding. They may be used in the same way that opinions put forward by a private commentator may be used, but not otherwise.[1] Only the formal utterance of the legislature, or of some one authorized for that purpose by the constitution of the State or other express legislation, can have the actual force of law. The width of the difference between the two methods is shown by the fact that English-speaking students almost always have some difficulty, when they first come to hear of the Continental method, in believing that it is really so. Passages can be found in English books of great reputation which more than hint a doubt whether tolerably certain knowledge of the law can be attainable in a jurisdiction where the decisions of the courts are not regularly reported and published.

It is not our business now to discuss the merits of the different systems and principles that prevail in English-speaking countries on the one hand, and in most foreign countries on the other. We are concerned only to call attention to their existence and magnitude. For our present purpose it may be assumed that civilized nations, including ourselves, have by this time shaped their institutions, on the whole, into something which in each case is at least as suitable to their character and habits as anything of a different pattern that the wisdom of strangers could devise for them. But it should be understood, first, that the institutions we think so natural do not always appear natural in other parts of the world and under other frames of society which we have no right to deem less civilized than our own; next, that we have acquired or preserved them, peculiar as they are, not by some spontaneous genius of the Anglo-Saxon race, but through the course of a long and

[1] For practical purposes the view which a higher court is known to be in the habit of taking has almost the force of law for a judge of first instance, whatever the theory of the law may be: so also the authority of decisions tends to increase wherever they are systematically reported, as in France: but these matters are not now before us.

complex national history; and last, that they must be studied in the light of that history if they are to be rightly understood.

Justice, then, is public; the business of courts is to hear parties and determine between them according to the rules of law, not to conduct an inquiry; that which the court finds as law is and remains the law; such are the principles that have remained characteristic of our judicial proceedings. These, with their developed consequences, are now peculiarly Anglo-Saxon. Once they were common to all the Germanic peoples, the "barbarians" whose customs must have seemed not only crude but insignificant, except for the immediate necessities of practice, to the trained lawyers of medieval Italian schools. Every kind of method has been employed to keep the working powers of our laws and judicature on a level with the needs of society. Acts of royal power, daring fictions, the patient and subtle contrivance of practitioners, legislation on all scales and intricate in all degrees, have had their share. For centuries the rival and essentially different systems of the canon law was administered in the Courts of the Church by judges and advocates whose ambition and energy were not less at any time than those of the common lawyers, and whose technical equipment was more complete. The King's courts themselves, as late as the thirteenth century, were in the hands of clerks in orders, men who were canonists or civilians by breeding. Canonical procedure was the very pattern of the new and powerful instruments of justice which two centuries later were brought into play by the Court of Chancery. Through all this, nevertheless, the old Germanic framework remained unbroken. Overloaded as it was with refinements, eccentricities, and exceptions, the exceptions never became the rule. Many foreign inventions were assimilated, but the native element subdued their spirit to itself. Clerical judges were no less steadfast than lay barons and suitors in their allegiance to the custom of the realm. The jury, which had its beginning as an engine of royal authority to override ancient formalism, became a bulwark of popular rights, and so much did it seem not only English but English born that pious legend ascribed its establishment to Alfred, the first and greatest of English heroes. The Chancellors and their officers triumphed indeed; they pursued forms of wrong which the common law could not pursue, convicted the wrongdoers out of their own mouth, and compelled them to redress and restitution far more thoroughgoing than the process of the common law could ever compass. But in the moment of its triumph the Chancery

had already ceased to be a foreign power. The Chancellor might speak with a Roman accent, but he had to speak with an English tongue. His equity was no longer a method of justice outside the law; it was a new kind of law with different and more searching machinery, but still working on English lines. The element of arbitrary discretion dwindled and the element of rule and precedent waxed. Suitors, or rather their lawyers, had a new game to learn, but they had to watch their play and mark their points as carefully as in the old one.

Persistent attempts again were made in the Tudor and Stuart reigns to set up new courts proceeding by Continental rather than English methods. For some time they seemed likely to succeed, and if the undertaking had been carried on with more discretion the success might well have been permanent. The Star Chamber flourished through several generations, and was a terror to some evil-doers whom the ordinary courts could not effectually reach. But it was also worked in such fashion and to such ends that it became an oppression to honest men, and, having become a symbol of everything most odious in Charles I.'s claims to absolute power, it was involved in the fall of Charles I. and his cause. Under the Restoration, so far from any serious attempts at reaction being made in the department of justice and legislation, half-finished reforms that had been planned under the Commonwealth were quietly carried out. When the Revolution of 1688 finally showed how superficial the political reaction had been, the triumph of English liberties was more than ever felt to be the triumph of English law. Professed zeal for the reform of law, far from being regarded as a sign of liberal opinions, was at that time more likely to bring the reformer into suspicion of a desire to corrupt the common law to tyrannical principles. This kind of suspicion was by no means extinct even in the latter part of the eighteenth century, and it was only in Lord Eldon's time that the union of conservatism in politics and in law was accomplished, while the popular cause became the cause of deliberate and avowed innovation, proceeding by way of appeal not to experience as embodied in the ancient custom of the realm, but to the general welfare as deduced by direct reasoning on principles of utility.

The utilitarian movement of the Reform Bill period and its consequences have tended to obscure for us the importance of another element which has had much to do with the character and stability of English legal institutions. I mean the conception of law as a

body of custom and observance not immutable indeed, but so continuous that legislative acts are only incidents in its life, and its being does not depend on legislation or upon the express will of any defined authority. This conception may be open to dispute, and in fact has been strenuously disputed, on philosophical grounds: as a matter of historical fact, however, it is undoubtedly the conception which prevailed among English lawyers and publicists from the beginning of any systematic treatment of English law till about the middle of the nineteenth century; in other words, for nearly seven hundred years. It derived its strength and significance from the all-important fact that the "custom of the realm" was the custom not of this or that province, or of a subordinate principality, but of the Kingdom. Custom coextensive with the King's regular authority, and certified by the King's own judges, was a different matter from the merely local customs of a town or a privileged jurisdiction. The King of France might well seem to be on a higher level of authority than the Custom of Paris or of Orleans. No such superiority was obvious, or was admitted, in the case of the King of England. Our medieval writers represent him as the patron, protector, and spokesman of the law, not as its master. They will yield the palm of elegant form and scientific method to the written laws of Rome, now the theme of ingenious Italian glossators whose comments are themselves acquiring authority: but they will in the same breath maintain that our unwritten customs, though they may seem but a disorderly crowd, are as truly a body of law as the sentences of the Code and the Digest. One may quote the Roman books for want of any other authority: one may transcribe, as Bracton did, whole pages of a famous glossator; but Englishmen are to be bound by what the King and his counsellors declare, not by the precepts of any Roman book. For the custom of the realm is a living custom, and it grows by the judgments of the King's judges, which, however learned and artificial they may have to be in cases of difficulty, spring from its own soil.

English politics and the development of our constitution have been more influenced than would appear at first sight by the settled habit of regarding the law of the land as essentially founded on custom, and only determined in particulars, and as it were accidentally, by legislation. Down to quite recent times each of the opposing parties, whatever the question at issue might be, was anxious to show, if possible, that it already had the law on its side

rather than to produce legislation in favor of its opinions. This has perhaps not been the least of the forces that have made for the continuity of our institutions; its operation has not been an unmixed good, but few unprejudiced students of our history will doubt that the good has been far greater than the harm. From the merely legal point of view this frame of mind is at least so far commendable that it gives some security against ambitious improvements of the law which are found, on subsequent judicial consideration, to have really added nothing and amended very little.

Within the last two generations, that is to say, since the reforming movement best known to general history in the Parliamentary Reform of 1832, but fruitful in several other directions, there has been a reaction against the traditional view. This is partly because, as Maine pointed out, the functions of express legislation have become far more conspicuous and important. Also the legal habit of mind was not fitted to solve great political problems. The lawyer, so long as he does not transcend the province of his own science, works within a given political system and assumes its stability. He must know the forms and authentic marks of the legislation to which the courts are bound to give effect, but much of the legislation he has to do with is of a minor administrative kind. Rating and sewers are more familiar to the modern practitioner in the Queen's Bench Division than the Bill of Rights; and his ardor as a citizen in advocating legal or other reforms will hardly be enhanced by the reflection forced on him as a lawyer that every piece of reform, so far as it can affect him and his colleagues, will probably mean the learning of new points of practice. The modern theory of Sovereignty, as understood by English writers, which puts the command of the lawgiver in the first place, or even admits no other origin of law, is really not a doctrine of lawyers, but a protest of publicists against the legal tradition. Hobbes in the middle of the seventeenth century, Bentham and his disciples at the close of the eighteenth and the early part of the nineteenth, objected, for very different reasons, to the prevalent constitutional theories of the time. Hobbes sought to attribute absolute power to the King as he was. The successors who developed Hobbes's fundamental positions in detail, adding little to them because Hobbes's dialectical genius had really left little to add,[1] attributed the same power to Parliament as they hoped to make it, with the

[1] Maine, Early History of Institutions, 354.

further hope that a reformed Parliament, conscious of that power, animated by benevolence, and enlightened by modern science, would devote its labors to the promotion of the greatest happiness for the greatest number. They started with this strong point in their favor, that as a matter of fact, our Imperial Parliament answers more nearly to the description of sovereign power according to the school of Hobbes, Bentham, and Austin, than any other legislative assembly in the world. Such were the expectations of the philosophical Radicals in the Reform Bill time: the margin of error and accident between what was expected and what was realized was certainly no greater than is commonly observed in undertakings of that magnitude, and the theory of Sovereignty was perhaps as useful in the day of Bentham and Grote as the theory of the Social Contract had been in the day of Locke. Both were at least inadequate as speculative doctrines, but each of them embodied points of practical wisdom and of relative doctrinal validity which were in need of an intellectual habitation and a name.

For the rest, the uncontrolled legal supremacy of Parliament, long recognized in practice by the courts, appeared to receive a satisfying philosophical confirmation from a theory which, in all probability, had been suggested by that remarkable and almost singular feature of our constitution. We must not forget that the omnipotence of Parliament, as it is often called, was quite as firmly asserted by Blackstone as by his reforming critics.

It would be difficult to say how far the traditional view of law as "custom of the realm" is connected with that specially characteristic rule of English-speaking commonwealths, that "every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."[1] The proximate reason of this would seem to have been that the King's ordinary judges happily became at an early period of our legal history a compact and powerful body who would brook neither executive encroachments on their jurisdiction nor exemptions of official persons from it. But their work, we may well believe, was made both easier and more effective by the feeling that the law they administered was not local, personal or arbitrary, but universal. We speak of the King's peace, the King's judges and the King's writ, but I do not think Englishmen ever commonly talked of the King's law. No doubt our Kings down to Charles I.

[1] Dicey, Law of the Constitution, 4th ed. p. 183.

claimed an extraordinary jurisdiction to supplement, though not to contradict, the ordinary methods of justice. Out of this power the Court of Chancery grew, and lived: a fact which is not to be forgotten because out of the same power the Court of Star Chamber grew, and perished. It can only be matter of speculation whether, if the Stuarts had been more prudent, further developments of this kind would have taken place, and whether they might have been less or more satisfactory than the various improvements in our judicial system which have been affected by express legislation. As it was, the common law and its methods prevailed. The multifarious forms in which executive regulation and discretion are now exercised in the administration of our affairs of state have to be justified, not by the mere authority of the Crown, but under powers expressly conferred by the enactments of the Crown in Parliament; the interpretation of those powers is in the hands of the judges; and the supremacy of the ordinary law is kept in constant sight and activity by the interested vigilance of those who, with or without success, invoke the assistance of the court either as public authorities, claiming to enforce their rights, or as individuals disputing their alleged liabilities. Legislation has grown upon us, but with it and even because of it the reign of judicial law has grown too.

The truth of this remark, I conceive, must be still more obvious in the United States, where the powers of the Federal Government exist only by virtue of a written constitution, and the powers of State Governments and legislatures are controlled partly by their own constitutions and partly by the Constitution of the United States, while the power of interpreting those fundamental instruments is left, in accordance with our common tradition, to the ordinary courts of justice.

In the ancient courts of the hundred and county, the assembled freemen "made" their judgments, as the form ran. The modern judgments of the common law are made by delegation, the learned persons who render them being appointed in ways which establish a more or less direct connection with the citizens of the commonwealth as a whole. But we make them still.

Frederick Pollock.